Public Finance Bhd v Lee Bee Rubber Factory Sdn Bhd & Ors

HIGH COURT (PENANG) — CIVIL SUIT NO 23-111-84
EDGAR JOSEPH JR SCJ
9 DECEMBER 1993

Civil Procedure *— Interest — Judgment debt — Interest on judgment sum — Whether limited to 8%pa as provided in O 42 r 12 of the Rules of the High Court 1980 — Whether court could allow higher rate stipulated in contract — Rules of the High Court 1980 O 42 r 12*

Civil Procedure *— Setting aside — Default judgment — Defence on the merits — Whether judgment regularly obtained — Rules of High Court 1980 O 42 r 12*

Civil Procedure *— Setting aside — Default judgment — Application made 2½ years after default judgment entered — Whether guilty of laches and not bona fide*

Contract *— Non est factum — Guarantee — Whether guarantors knew nature and effect of guarantee*

Contract *— Undue influence — Guarantee — Joint guarantors were husband and wife — Whether presumption of undue influence could arise by reason of marital relationship*

The plaintiff, a finance company, entered into an equipment lease agreement ('the lease agreement') with the first defendant ('the defendant company'). The second and third defendants, who were directors of the defendant company, were guarantors to the lease agreement under a guarantee dated 17 August 1982. The defendant company defaulted on the lease agreement and on 27 September 1984, the plaintiff obtained judgment in default of defence against all three defendants for the sum of RM209,988.40 together with interest at the rate of 2% per month from the date of default until the date of realization as stipulated in art 19 of the lease agreement.

The second and third defendants have applied to set aside the judgment in default some 2½ years later on the grounds that: (i) the judgment had not been regularly obtained in that it purported to award a rate of interest well in excess of the limit of 8%pa provided in O 42 r 12 of the Rules of the High Court 1980 ('the RHC') prior to its amendment in 1986; (ii) they were unaware of the nature of the guarantee they had signed and the plaintiff had innocently misrepresented its nature to them, ie a plea of non est factum; and (iii) the third defendant had signed the guarantee under undue influence from the second defendant, her husband.

Held, dismissing the application:

(1) It was permissible to enter judgment with interest on the judgment debt exceeding the statutory rate of 8%pa if there was an independent covenant as to the rate of interest, in which event,

the doctrine of merger would be inapplicable. The provisions of art 19 were not merely ancillary but constituted an independent covenant for the payment of interest at the stipulated rate of 2% per month.

(2) By virtue of the guarantee, the second and third defendants had expressly agreed to incur personal liability as principal debtors and not merely as sureties in respect of all sums due by the defendant company to the plaintiff under the lease and, by virtue of cll (1) and (2) of the guarantee, art 19 of the lease agreement was incorporated by reference into the guarantee and applied to the second and third defendants.

(3) As directors and shareholders of the defendant company and as persons possessing business acumen, it was the second and third defendants' duty to know the nature and effect of the documents they were signing and it was impossible to give the slightest credence to their allegation that they were mistaken about the contents of the guarantee or that there had been any misrepresentation on the part of the plaintiff.

(4) There was nothing unusual in the third defendant showing her affection for her husband, the second defendant, in a tangible way, as for example, by guaranteeing repayment of his debts. The affection and confidence inherent in the marital state did not, ipso facto, amount to undue influence in the eyes of the law. In this case, the presumption of undue influence did not arise.

(5) It was clear law that a defendant seeking the indulgence of the court to set aside a default judgment should make full, frank, candid and honest disclosure of all the relevant facts. In waiting for some 2½ years after judgment in default had been entered before making their application, the inevitable conclusion of the court was that the second and third defendants were guilty of laches, their conduct was not bona fide and was lacking in candour.

[Bahasa Malaysia summary

Plaintif, sebuah syarikat kewangan, telah mengikat suatu perjanjian pajakan alat kelengkapan ('perjanjian pajakan itu') dengan defendan pertama ('syarikat defendan itu'). Defendan kedua dan ketiga, yang merupakan pengarah syarikat defendan itu, merupakan penggerenti perjanjian pajakan itu di bawah suatu gerenti bertarikh 17 Ogos 1982. Syarikat defendan itu telah memungkiri perjanjian pajakan itu dan pada 27 September 1984, plaintif telah mendapat penghakiman ingkar pembelaan terhadap ketiga-tiga defendan bagi jumlah RM209,988.40 bersama dengan faedah pada kadar 2% sebulan daripada tarikh kemungkiran perjanjian itu hingga tarikh pembayaran seperti yang diperuntukkan di dalam perkara 19 perjanjian pajakan itu.

Defendan kedua dan ketiga telah memohon untuk mengetepikan penghakiman ingkar itu lebih kurang 2½ tahun kemudian atas alasan bahawa: (i) penghakiman itu tidak diperolehi mengikut aturan kerana

A ia kononnya mengawardkan suatu kadar faedah yang jauh melebihi had 8% setahun seperti diperuntukkan di dalam A 42 k 12 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') sebelum ianya dipinda pada tahun 1986; (ii) mereka tidak sedar akan sifat gerenti yang telah ditandatangani oleh mereka dan plaintif telah melakukan salah nyata ikhlas tentang sifatnya kepada mereka, iaitu suatu pli non est factum; B dan (iii) defendan ketiga telah menandatangani gerenti itu di bawah pengaruh tidak wajar daripada defendan kedua, iaitu suami beliau.

Diputuskan, menolak permohonan itu:

(1) Suatu penghakiman boleh dimasukkan dengan faedah atas jumlah C penghakiman yang melebihi kadar statutori sebanyak 8% setahun jika terdapat suatu waad bebas mengenai kadar faedah, dan dengan demikian, doktrin percantuman tidak terpakai. Peruntukan perkara 19 bukan hanya merupakan peruntukan sampingan tetapi merupakan suatu waad bebas untuk pembayaran faedah pada kadar 2% sebulan seperti yang ditetapkan.

D (2) Mengikut gerenti itu, defendan kedua dan ketiga secara nyata bersetuju menanggung liabiliti peribadi sebagai sihutang utama dan bukan hanya sebagai penggerenti untuk semua wang yang kena dibayar oleh syarikat defendan itu kepada plaintif di bawah pajakan itu dan, mengikut fasal (1) dan (2) gerenti itu, perkara 19 E perjanjian pajakan itu digabungkan secara rujukan ke dalam gerenti dan terpakai kepada defendan kedua dan ketiga.

(3) Sebagai pengarah dan pemegang saham dalam syarikat defendan itu dan sebagai orang yang mempunyai kepintaran dalam perniagaan, adalah menjadi tanggungjawab defendan kedua dan ketiga untuk mengetahui sifat dan kesan dokumen yang telah F ditandatangani oleh mereka dan pengataan bahawa mereka tersilap mengenai kandungan gerenti itu dan bahawa terdapat salah nyata oleh plaintif tidak mungkin dipercayai.

(4) Tidak terdapat sebarang keluarbiasaan apabila defendan ketiga menunjukkan kasih sayangnya terhadap suaminya, defendan G kedua, dalam cara yang ketara, misalnya dengan menggerenti pembayaran balik hutangnya. Kasih sayang dan keyakinan yang memang wujud dalam keadaan perkahwinan tidak, ipso facto, terjumlah kepada pengaruh tidak wajar di sisi undang-undang. Di dalam kes ini, anggapan mengenai pengaruh tidak wajar tidak timbul.

H (5) Adalah menjadi undang-undang nyata bahawa seorang defendan yang memohon kebenaran mahkamah untuk mengetepikan suatu penghakiman ingkar seharusnya membuat pendedahan mengenai semua fakta relevan secara penuh, terus-terang, dan jujur. Dengan menunggu selama lebih kurang 2½ tahun selepas penghakiman I ingkar telah dimasukkan sebelum membuat permohonan mereka, keputusan mahkamah yang tidak dapat dielakkan adalah bahawa defendan kedua dan ketiga bersalah kerana kelengahan (laches), kelakuan mereka tidak bona fide dan kurang berterus terang.]

Notes

For a case on undue influence, see 3 *Mallal's Digest* (4th Ed) para 1610.
For cases on the proper rate of interest on judgment debts, see 2 *Mallal's Digest* (4th Ed) paras 1158, 1167–1171.
For cases on setting aside judgments, see 2 *Mallal's Digest* (4th Ed) paras 1300–1326.

Cases referred to

1 *Public Bank Bhd v Hara Industries Sdn Bhd & Anor* [1988] 2 MLJ 618 (not folld)
2 *Supreme Finance (M) Bhd v Koo Sin Ken* [1987] 1 MLJ 296 (not folld)
3 *Malaysia Building Society Ltd v Lim Kheng Kim & Ors* [1988] 3 MLJ 175 (folld)
4 *American International Assurance Co Ltd v Union Builders (Malaysia) Sdn Bhd* [1973] 1 MLJ 95 (folld)
5 *Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd* (1988) 1 MLJ 257 (folld)
6 *Popple v Sylvester* (1883) 22 Ch D 98 (folld)
7 *Re Sneyd, ex p Fewings* (1883) 25 Ch D 338 (folld)
8 *London Borough of Ealing v El Isaac & Anor* [1980] 2 All ER 548 (folld)
9 *Lowry v Williams* [1895] 1 IR 274 (folld)
10 *Bank of China v Chia Sook Lan, Maria* [1976] 1 MLJ 41 (refd)
11 *Phillips v Hutchinson* [1946] VLR 270 (refd)
12 *Bank of New South Wales v Rogers* (1941) 65 CLR 42 (refd)
13 *Taylor v Johnson* (1882) 19 Ch D 603 (refd)
14 *Radcliffe v Price* (1902) 18 TLR 446 (refd)
15 *Westmelton (Vic) Pty Ltd v Archer* [1982] VR 305 (refd)
16 *Allcard v Skinner* (1887) 36 Ch D 145 (refd)
17 *Yerkey v Jones* (1939) 63 CLR 649 (refd)
18 *Wheeler v Sargeant* (1893) 69 LT 181 (refd)
19 *Colonial Bank of Alasia v Kerr* (1889) 15 VLR 74 (refd)
20 *Shephard v Midland Bank Plc* [1987] 2 FLR 175 (refd)
21 *Ban Huat Seng Co Ltd v Lee Poh Soo* [1967] 1 MLJ 145 (refd)
22 *Hong Leong Equipment Sdn Bhd v Manfo Development Sdn Bhd & Anor* [1986] 1 CLJ 417 (refd)
23 *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 (folld)
24 *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 (refd)

Legislation referred to

Rules of the High Court 1980 O 42 r 12

Walter BC Teoh (*Cheong Wai Meng & Van Buerle*) for the plaintiff.
Abdul Rashid bin Abdul Karim (*Yacob & Rakan-Rakan*) for the defendants.

Edgar Joseph Jr SCJ: This was an application by the second and third defendants to set aside a judgment in default of defence on two separate grounds, namely, that the judgment was not regularly obtained and, in the alternative, that there was a defence on the merits.

The application was opposed by the plaintiff, a finance company ('the plaintiff company').

After hearing counsel in chambers, I had granted the application to set aside the judgment in default of defence on the ground that the judgment was not regularly obtained. But the plaintiff company, being dissatisfied with my decision, applied for further arguments, and I acceded to that request, by hearing further arguments about one week ago.

The history of the matter which calls for the consideration of the court may be shortly stated.

The plaintiff company is and was at all material times to this suit a licensed finance company within the meaning of the Finance Companies Act 1969, carrying on the business, inter alia, of financing leasing transactions.

The first defendant is and was, at all material times to this suit, an incorporated company with its registered office at 2, Main Road, Sungai Lalang, Bedong, Kedah ('the defendant company').

The second and the third defendants are husband and wife and were, and are, at all material times to this suit, directors of the defendant company.

By a lease agreement in writing dated 17 August 1982, made between the plaintiff company of the one part and the defendant company of the other part ('the lease agreement'), the plaintiff company had agreed to lease to the defendant company five units of equipment defined in the schedule thereto ('the equipment') upon the terms and conditions appearing therein.

It is necessary to advert to some of the more important provisions of the lease agreement so far as material to this case.

The lease agreement provided, inter alia, for the payment of a deposit of RM56,840, receipt whereof the plaintiff company duly acknowledged, and payment of the balance sum by 36 monthly rent instalments of RM8,779 each.

The lease agreement further provided that the defendant company had agreed, inter alia, as follows:

(1) to keep the equipment at 2, Main Road, Sungai Lalang, Bedong, Kedah;
(2) to pay interest at the rate of 2% per month flat on any moneys payable under the lease agreement which might from time to time be overdue; and
(3) to pay the costs of repossession, storage, repair and maintenance of the equipment.

Now, in consideration of the plaintiff company agreeing to lease the equipment to the defendant company and entering into the lease agreement, the second and the third defendants had by a guarantee agreement in writing dated 17 August 1982 ('the guarantee') agreed to undertake and

guarantee the payment by the defendant company of all sums of moneys which might become payable by the defendant company under the terms and conditions of the lease agreement and the due performance and observance by the defendant company of the stipulations and conditions therein contained.

It was alleged by the plaintiff company that in breach of the lease agreement the defendant company had defaulted as follows:

(1) after payment of 14 rent instalments amounting to RM122,906, it had failed to pay any of the subsequent agreed rent instalments payable under the lease agreement; and
(2) the equipment had not been kept at the address stipulated in the lease agreement.

It was further alleged that by reason of the breaches aforesaid, the plaintiff company had given due notice thereof to the defendant company and made repeated demands for the return of the equipment and/or for payment of the outstanding balance sum of RM249,964.40 (with particulars), yet the defendant company had failed to comply with the same.

It was contended that by reason of the alleged breaches, the defendant company had repudiated the lease agreement.

Accordingly, by a letter dated 30 November 1983, the plaintiff company, through its solicitors, had accepted the defendant company's alleged repudiation and terminated the lease agreement with immediate effect.

It was further contended that by reason of the matters aforesaid, the defendant company owed the plaintiff company a balance sum of RM249,964.40 and interest thereon at the agreed rate of 2% per mensem thereon and, that despite repeated demands made by the plaintiff company, upon the defendants for payment, none of the defendants had made payment of the said sum or any part thereof, nor the agreed interest payable thereon.

The plaintiff company had, therefore, by their statement of claim prayed for judgment against the defendant company, the second and third defendants, jointly and severally as follows:

(a) the said balance sum of RM249,964.40 together with interest thereon at the rate of 2% per month flat on RM8,779 from 29 November 1983 till the date of payment or satisfaction; and
(b) costs.

It is noteworthy that although the defendants had by their then solicitors, Messrs Sykt Vijaya & Co, entered an appearance to the writ which the plaintiff company had caused to be issued and served upon them, no defence had been filed with the result that the judgment in default of defence aforesaid had been entered against all three defendants and, it was not until some 2½ years later that this application to set aside the judgment in default of defence was made on behalf of the second and third defendants by their new solicitors, Messrs Yacob & Rakan-Rakan.

It would be convenient, if at this stage, I reproduced the judgment in default which had been entered by the plaintiff company against the defendants. It reads as follows:

A No defence having been served by the first, second and third defendants herein, it is this day adjudged that the first, second and third defendants do pay the plaintiff the balance sum of RM209,988.40 together with interest thereon at the rate of 2% per month flat on RM8,779 calculated from 29 November 1983 to the date of payment or realization and RM225 costs.

B Entered 27 September 1984.

I must next turn to consider the case for the second and third defendants as it appears from their affidavits filed in support of their application to set aside the default judgment.

First of all, they had explained that their omission to file their defence C which had resulted in judgment in default being entered against them was due to their ignorance of the rules of procedure and of their rights in the suit.

I need hardly say that this explanation is unacceptable since, as I have already noted, at the time when default judgment was entered against them, they were represented by their former solicitors, Messrs Sykt Vijaya & Co, D as is apparent from the appearance entered on their behalf to the writ of summons.

Be that as it may, as I have said, it was not until some 2½ years later that the second and third defendants retained the services of another firm of solicitors, to wit, Messrs Yacob & Rakan-Rakan, who then made this E application to set aside the judgment in default of defence. However, no explanation was vouchsafed to this court for the inaction and delay in their doing so.

Secondly, it was contended by counsel on behalf of the second and third defendants that the judgment in default of defence had not been regularly obtained in that it provided for the payment by all three defendants of the F balance sum of RM209,988.40 together with interest thereon at the rate of 2% per month flat on RM8,779 calculated from 29 November 1983 to the date of payment or realization, contrary to the provisions of O 42 r 12 of the Rules of the High Court 1980 ('the RHC') in the form that it took prior to its amendment by PU(A)445, dated 29 October 1986, and which was in G the following terms:

> Every judgment debt shall carry interest at the rate of 8% per annum or at such other rate not exceeding the rate aforesaid as the court directed such interest to be calculated from the date of judgment until the judgment is satisfied.

In other words, the contention of counsel was that as at the material time H the jurisdiction of the court to award interest on every judgment debt in respect of the post-judgment period was limited to a maximum sum under the provisions of O 42 r 12 in the form that it took prior to its amendment, to 8%pa, yet the default judgment in this case purported to award a rate of interest on such sum and for such period well in excess of that limit, the I effect of which was that the default judgment had not been regularly obtained.

In support, the judgment of the High Court (VC George J) in *Public Bank Bhd v Hara Industries Sdn Bhd & Anor*[1] and the judgment of the

Supreme Court (Lee Hun Hoe CJ (Borneo) speaking for the court) in *Supreme Finance (M) Bhd v Koo Sin Ken*,[2] were cited.

In the *Supreme Finance* case,[2] Lee Hun Hoe CJ (Borneo), approving of the judgment in the *Public Bank* case,[1] said this [at p 297]:

> Clearly, where a judgment is recovered in respect of a debt any other personal remedy for the same debt is extinguished or merged in the judgment. In which case under O 42 r 12 the interest will be at the rate of 8%pa or such other rate not exceeding 8%pa as the court directs from the date of judgment until satisfaction. Order 42 r 12 makes no distinction between debts in respect of which the parties have made an agreement in respect of interest and those where there is no such agreement ...

As I had occasion to point out in the case of *Malaysia Building Society Ltd v Lim Kheng Kim & Ors*[3] at p 178 col 2C–F, when dealing with an issue identical to that which I am now considering, the Federal Court (Ong CJ speaking for the court), in the earlier case of *American International Assurance Co Ltd v Union Builders (Malaysia) Sdn Bhd*,[4] took a contrary view to that taken by Lee Hun Hoe CJ (Borneo) in the *Supreme Finance* case,[2] in holding that the chargee's claim in that case was not on the covenant but in exercise of their statutory remedy against a chargor in default and so the personal remedy for the debt secured by the charge was not merged with the judgment.

And, I also went on to point out in the *Malaysia Building Society* case,[3] (at p 179 col 2F–H) that the conflict of authority aforesaid appeared to have been resolved by the Supreme Court in *Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd*,[5] which restored, at least by necessary implication, the judgment of the Federal Court in the *American International Assurance Co* case,[4] since it is authority for the proposition that an order for sale under s 257(1)(a) of the National Land Code 1965 ('the NLC'), is not a judgment debt under O 42 r 12, that the doctrine of merger is without application in proceedings under the NLC to enforce a charge and so the covenanted rate of interest continues to apply until realization notwithstanding the order for sale.

Having said that, I recognized, as I must, that all three of the last mentioned cases, namely, the *Supreme Finance* case,[2] the *American International Assurance* case[4] and the *Malaysian International Bankers Bhd* case,[5] were cases concerning applications to enforce a charge under s 257(1)(a) of the NLC by way of an order for sale of the charged land.

However, in the *Malaysian Building Society* case,[5] the plaintiffs had obtained judgment in default of appearance against the defendants under a joint and several guarantee for a judgment debt, which the defendants had later attempted to have set aside primarily on the ground that the judgment was not regularly obtained in that the plaintiff had entered judgment for a sum in excess of that which was lawfully due to the plaintiff; in particular, that it was not permissible for the plaintiff to obtain judgment for interest at the rate of 14%pa for the post-judgment period, regard being had to the provisions of O 42 r 12 of the RHC in the form that it took prior to its amendment, which provided for interest at the rate of 8%pa on post-judgment debts.

A On this point, I had held that it is permissible to enter judgment with interest on the judgment debt exceeding the statutory rate of 8%pa if there was an independent covenant as to the rate of interest, in which event, the doctrine of merger would be inapplicable. In so holding, I had relied on a number of English authorities, namely, *Popple v Sylvester*;[6] *Re Sneyd, ex p Fewings*;[7] *London Borough of Ealing v El Isaac & Anor*;[8] and *Lowry v* B *Williams*.[9]

The following passage [at p 551] in the judgment of Templeman LJ (as he then was) in the *London Borough of Ealing* case[8] will repay reading:

> I do not for myself understand how a debt payable with interest until actual repayment can be merged in a judgment without interest or with a different rate C of interest payable thereafter. The merger doctrine, which was upheld by this court in *Re Sneyd* (1883) 25 Ch D 338, may be due to the fact that, in former ages, high rates of interest marked the progress of the individual on the path to perdition; whereas, in this day and age, high interest rates mark the road towards national prosperity.
>
> Merger does not apply where there is an independent covenant nor does it D apply to a security ...

In the present case, the claim for interest was based upon art 19 of the lease agreement which provided:

> Interest on overdue payments
>
> E Without prejudice to the rights of the lessor against the lessee under the terms of this lease agreement if the lessee fails to pay any sums or moneys whatsoever due under this lease agreement (including but not limited to the rent, the agreed loss value and any costs and expenses advanced by the lessor on behalf of the lessee) the same shall bear interest at the rate described in item (10) of the schedule from the date due until payment is made in full by the lessee with such interest.

F Item (10) of the schedule referred to in art 19 stipulates that the rate of interest is at 2% per month.

Clearly, the provisions of art 19 are not merely ancillary but constitute an independent covenant for the payment of interest at the stipulated rate within the meaning of the authorities cited.

G But the point regarding this part of the case must be taken further.

The second and third defendants were guarantors pursuant to the guarantee dated 17 August 1982 (annexed in the affidavit of Ooi Ban Huat marked as exh OBH–1). As such guarantors, and by virtue of the guarantee, they had expressly agreed to incur personal liability *as principal debtors* and H not merely as sureties, in respect of *all sums due* by the lessee to the lessor under the lease agreement and *due performance and observance of all terms and conditions of the lease agreement.*

The material clauses of the guarantee, so far as material to this case, were cll (1) and (2) which provided:

I (1) In consideration of the lessor having agreed at the request of the guarantors to enter into the equipment lease agreement with the lessee the guarantors hereby jointly and severally guarantee *as principal debtors* and not merely as sureties to the lessor the due and punctual payment by the lessee of *all sums payable by the lessee to the lessor under or pursuant to the equipment lease*

agreement and due performance and observance by the lessee of all terms and conditions of the equipment lease agreement on the part of the lessee to be observed and performed thereunder and any variation thereof.

(2) In the event of the lessee failing to observe and perform any of the covenants undertakings stipulations and terms contained in the equipment lease agreement on the part of the lessee to be observed and performed, the guarantors shall on demand indemnify the lessor and its assigns and successors-in-title against all losses, damages, cost or expenses or otherwise which may be incurred by the lessor and all actions, claims and demands which may be instituted or made against the lessor or in any way connected with or arising out of or incidental to the equipment lease agreement. (Emphasis provided.)

By virtue of cll (1) and (2) of the guarantee, art 19 of the lease agreement was incorporated by reference into the guarantee and applied to the second and third defendants.

In the circumstances, I saw no reason to depart from what I had said in the *Malaysia Building Society* case,[3] and I accordingly dismissed the objection that the default judgment in this case was not regularly obtained.

Thirdly, I had to consider the alternative ground advanced by counsel for the second and third defendants, namely, that there was a good defence on the merits. The burden of establishing this point, of course, rested on the second and third defendants.

The second and third defendants had alleged in their affidavits filed in support of their application that, at the material time, they were unaware that the document dated 17 August 1982 and clearly entitled 'Guarantee', was a guarantee and that the nature of the document was not fully explained to them. They had further alleged that they were mistaken in thinking that what they had signed was the lease agreement. In the alternative, they had also alleged that the plaintiff company, by its silence in not drawing their attention to the fact that the document concerned was a guarantee, had innocently misrepresented its nature.

And, as for the third defendant, she had in addition alleged that her husband, the second defendant, had exerted undue influence over her and that she had signed the guarantee merely in compliance with his wishes.

These allegations were, of course, denied by the plaintiff company in the affidavits-in-opposition filed on its behalf. In particular, the affidavit of the witness to the guarantee, Mr Ooi Ban Huat, affirmed on 6 June 1987, stated categorically, without contradiction by either the second or third defendant, that before the execution of the guarantee, he had fully explained the terms and conditions thereof to the second and third defendants.

Other considerations relevant to this part of the case are these. The guarantee and the lease agreement were comprised in separate documents with materially different clauses. The second and third defendants were, at all material times, directors of the defendant company. Indeed, the result of search of the records kept at the Registry of Companies as to directors' shareholdings, exhibited to the said affidavit, shows that at all material times, of the total number of shares of 800,002 in the defendant company which had been taken up, the second defendant was a majority shareholder

with 524,001 shares to his name, whilst the third defendant held 64,000 shares.

It can therefore be reasonably inferred from these facts that the second and third defendants, who had a real stake in the defendant company, were persons possessing business acumen and must therefore have understood the nature and effect of the guarantee. (See, eg *Bank of China v Chia Sook Lan, Maria*[10] at p 45.)

In other words, as directors and shareholders of the defendant company, it was their duty to know the nature and effect of the documents they were signing and thus it is impossible to give the slightest credence to their allegation that they were mistaken about the contents of the guarantee or that there had been any misrepresentation, albeit innocent, on the part of the plaintiff company.

The very late stage at which they had chosen to raise the plea of non est factum, bearing in mind that they were, at all material times, represented by solicitors after the writ had been served upon them, points to the same conclusion. In particular, if there was so much as a particle of truth in this plea, I would have expected them to take this point by way of a statement of defence soon after their former solicitors, Messrs Sykt Vijaya & Co, had entered an appearance to the writ. Having regard to the surrounding circumstances relevant to the issue of the validity the guarantee, which I have discussed, I accepted the version appearing in the uncontradicted affidavit of the attesting witness, Mr Ong, even though he was the plaintiff company's employee, as most probably true.

Certain considerations relevant to the third defendant's plea of undue influence may now be dealt with shortly.

There is ample authority to show that certain classes of relationship by themselves and nothing more do give rise to a presumption of undue influence; examples are: parent and child (see *Phillips v Hutchinson*[11]), a person in loco parentis and his charge (see *Bank of New South Wales v Rogers*[12]), guardian and ward (see *Taylor v Johnson*[13]), doctor and patient (see *Radcliffe v Price*[14]), solicitor and client (see *Westmelton (Vic) Pty Ltd v Archer*[15]), spiritual adviser and a member of his congregation (see *Allcard v Skinner*[16]), a man and his fiancee (see *Yerkey v Jones*[17] at p 675) and perhaps trustee and beneficiary (see *Wheeler v Sargeant*[18]).

Most people would think that a conspicuous omission from the list aforesaid is that of husband and wife. However, the case of *Yerkey v Jones*,[17] per Dixon J at p 675, shows that the approach of the courts is that there is nothing unusual in a wife showing her affection for her husband in a tangible way, as for example, by guaranteeing repayment of his debts. And, so, it is said, that the affection and confidence inherent in the marital state does not, ipso facto, amount to undue influence in the eyes of the law. (See *Colonial Bank of Alasia v Kerr.*[19])

I could not therefore hold, having regard to the authorities cited above, that simply by reason of the relationship of husband and wife existing between the second and third defendants, a presumption of undue influence arose.

There were other aspects to the plea of undue influence which I had also considered in deciding this application.

It was nowhere even alleged in the affidavits filed in support of this application or by way of reply to the affidavits in opposition, that the plaintiff company had exerted undue influence on the third defendant or that the plaintiff company was aware of any undue influence allegedly exerted by the second defendant over his wife, the third defendant, or that the plaintiff company had entrusted a third party, eg the second defendant, to procure the execution of the guarantee.

In the case of *Shephard v Midland Bank Plc*,[20] Neill LJ enunciated the relevant principles as follows:

> The court will not enforce a transaction at the suit of a creditor if it can be shown that the creditor entrusted the task of obtaining the alleged [guarantor's] signature to the relevant document to someone who was, to the knowledge of the creditor, in a position to influence the [guarantor] and who procured the signature of the [guarantor] by means of undue influence or by means of fraudulent misrepresentation.

I was therefore completely convinced that at all material times, the second and third defendants knew and approved of the contents of the guarantee and that upon the affidavit evidence, the plea of undue influence was not available to the third defendant.

Going back a little, there is another aspect to the very late stage at which the second and third defendants had chosen to raise the plea of non est factum and, in the case of the third defendant, the additional plea of undue influence (a delay of some two and a half years after judgment in default of defence had been entered) and this concerned the bona fides of their conduct in making the present application and whether it was barred by laches. (See *Ban Huat Seng Co Ltd v Lee Poh Soo*[21] per Ismail Khan J (as he then was) at p 147 col 1.)

The second and third defendants had, as I have already noted, explained in their affidavits that the reason for their inaction in filing a defence which had resulted in the default judgment being entered against them was because of their ignorance of the rules of procedure and their rights in the suit. This explanation is transparently false since their former solicitors, Messrs Sykt Vijaya & Co, had entered an appearance on their behalf on 28 April 1984, so that at the time the default judgment was entered on 27 September 1984, they were in fact represented by solicitors and therefore must have known of their rights and duties, yet no defence was filed.

Indeed, the second and third defendants did not bestir themselves even when the plaintiff had caused a writ of seizure and sale to be issued against the defendant company's factory on 26 February 1985 (see exh CSH5 to the affidavit of the plaintiff company's manager, Mr Choo) although, being directors and shareholders of the plaintiff company, they must, at least by then, have known that the plaintiff company was actively enforcing the default judgment. On the contrary, they waited some 2½ years before causing to be issued the application to set aside the default judgment.

In *Malaysia Building Society Bhd v Lim Kheng Kim*,[3] at p 184 col 2H, when dealing with the subject of delay in the context of a similar situation,

I had held that a delay of one year and two months in applying to set aside a default judgment gave rise to an inference of laches. In this context, the case of *Hong Leong Equipment Sdn Bhd v Manfo Development Sdn Bhd & Anor*[22] at p 419 para 3, also merits reading. I appreciated, however, that it was a question of fact in each case, whether the delay involved was so inordinate as to show that a party has been guilty of laches.

It is also clear law that a defendant who is seeking the indulgence of the court to set aside a default judgment should make full, frank, candid and honest disclosure of all the relevant facts. (See *Hong Leong Equipment Sdn Bhd v Manfo Development Sdn Bhd & Anor.*[22])

In these circumstances, the inevitable conclusion at which I had arrived was that the second and third defendants had been guilty of laches, their conduct had not been bona fide and there had been a deplorable lack of candour on their part.

I hasten to add that in considering the question whether the second and third defendants had disclosed a defence on the merits, I was mindful of the rule that generally, if there is a conflict of evidence which is not on the face of it implausible upon a question of fact which calls for the determination of a court, such conflict ought not to be disposed of on affidavit evidence only, but should be determined at the final hearing. On the other hand, in the words of Lord Diplock when delivering the advice of the Privy Council in *Eng Mee Yong & Ors v V Letchumanan*[23] (at p 217 col 2D–E), which concerned an application for removal of a caveat registered against land:

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement in an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.

In *Bank Negara Malaysia v Mohd Ismail & Ors*,[24] the Supreme Court held (at p 408D) that the principle of law aforesaid enunciated by Lord Diplock is applicable to all cases where a judge has to decide a matter on conflicting affidavit evidence.

In all the circumstances, I reversed the order I had earlier made in chambers, dismissed the application to set aside the judgment in default of defence, and affirmed the judgment in default of defence entered against all the defendants. The second and third defendants were also ordered to pay the costs of this application.

Application dismissed.

Reported by Joseph Lim Tim Lee